THE CHARTER OF RIGHTS AND FREEDOMS:

LEGAL RIGHTS

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THE CHARTER OF RIGHTS AND FREEDOMS: LEGAL RIGHTS

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ISSUE DEFINITION

The Canadian Charter of Rights and Freedoms came into force on April 17, 1982. The purpose of this analysis is to determine the effect that certain sections of the Charter dealing with "legal rights" have had on existing criminal law since then. This analysis is confined to matters of criminal law as that is the main thrust of the sections of the Charter under consideration.

The relevant sections of the Charter are 7 to 14 inclusive. They deal with such matters as the right to life, liberty and security; the right to be secure against unreasonable search and seizure; the rights of an accused upon arrest; the right of an accused to certain proceedings in criminal and penal matters; and the right not to be subject to cruel and unusual punishment.

As there are now a great number of decided cases dealing with these sections, this Review will concentrate on significant decisions of the provincial Courts of Appeal and the Supreme Court of Canada.

BACKGROUND AND ANALYSIS

A. The Interpretation of an Entrenched Charter

When analyzing the decisions of the courts regarding these sections, it is important to remember that the Charter is entrenched within the Constitution of Canada and that, by virtue of s. 52(1) of the Constitution Act, 1982, "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

Any familiarity Canadians may have with the effect of an entrenched statement of rights is gained mainly from the United States. One of the major issues to be considered when determining the effect of the Charter will be the level of judicial activism to be taken by the courts in their interpretation of the Charter. The activist role played by judges in the United States with regard to the effect of their Bill of Rights on the criminal law has been criticized as there is a perception that the courts have given greater weight to the rights of an accused than to the rights of the public at large.

It could be argued that two sections of the Canadian Charter illustrate a conscious attempt by its framers to restrain the Canadian courts from achieving the level of activism which has been prevalent in the United States and continue in some measure the Canadian heritage of parliamentary supremacy. Section 1 allows legislatures to impose reasonable limits upon rights and freedoms, while s. 33 allows the legislatures to expressly declare that a statute may operate notwithstanding certain sections of the Charter.

The other important issue faced by the courts is choosing a suitable method of interpretation in applying the sections of the Charter to existing criminal law. The choice is between the ordinary rules of statutory interpretation and the rules applied in the Edwards* case wherein the Constitution Act, 1867 was characterized as a "living tree" capable of growth and expansion within its natural limits. The point being made was that the Constitution Act, 1867, although undeniably a statute, was not a statute like any other, but a constituent or organic statute which was to provide the basis for the entire government of a nation over a long time. It is possible that the courts will favour the "living tree" type of interpretation of the Charter of Rights and Freedoms rather than treating it as a statute subject to ordinary rules of interpretation. In fact, until recently, Supreme Court of Canada judgments on Charter issues reflected this wider scope of interpretation. In its decision in the

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* The full citation of all cases mentioned by name appears in a table of cases at the conclusion of this paper.

Southam case the Court indicated that "the task of expounding a constitution is crucially different from that of construing a statute". When considering the application of the Charter, it is important to recognize that it is a purposive document; that is, "its purpose is to guarantee and to protect within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action". However, in a decision rendered in July, 1986 on the subject of delay in bringing accused persons to trial, the Supreme Court did not deal in its usual broad fashion with the Charter issue but decided the case on a narrow but important procedural point.

It is against this background of the contrast in concepts between the Charter and the American Bill of Rights that this review examines the legal rights protected by the Charter. Each section provides a short commentary on the possible problems and issues which will confront those who attempt to interpret and apply the section; then recent court decisions are set forth showing the impact of the section on the criminal justice system.

B. Fundamental Justice: Section 7

Section 7 states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This section presents two major problems to courts challenged with the task of giving full meaning to the Charter. First, one must deal with what is included in "life, liberty and security of the person" and, secondly, a meaning must be attributed to the phrase "fundamental justice".

It is arguable that many laws touch the broad concepts of fundamental justice. As to "life", laws which affect the beginning of life or the end of life have been challenged. As to "liberty", any law imposing

a penalty of imprisonment, could be affected, as could, within a prison, disciplinary or security measures imposing extra confinement, or parole or release procedures. As to "security of the person", laws which make provision for medical, surgical or psychiatric treatment, scientific experimentation with human beings, or sterilization could be challenged.

If "principles of fundamental justice" imply natural justice, then it can be argued that the rights set forth in s. 7 may be taken away as long as it is done in a procedurally fair way. The rules of natural justice are basically rules of procedure only and include the right to a hearing, the right to unbiased adjudication and the right to a "fair procedure". On this reading the courts would confine their review to the appropriateness and fairness of the procedures enacted for the deprivation of life, liberty or security of the person. This would argue against the importation of the United States jurisprudence on the "due process clause" contained in the 14th Amendment of the American Constitution which allows the court to review the substantive justification for the deprivation of the right. American courts have interpreted this section to mean that statutes which restrict various rights are subject to different levels of scrutiny, depending on the rights which are being dealt with. That is, those laws dealing with matters which are inherently discriminatory, such as race, colour or religion, are subject to strict scrutiny. Some other classifications are subject to "minimal scrutiny" which calls for a rational justification related to a legitimate governmental purpose. Finally, as a general point, Professor Peter Hogg argues that perhaps s. 7 supplements the more specific guarantees in the Charter (which will be discussed later) as these guarantees could be looked upon as elements of fundamental justice. Section 7 would be seen as a back-up clause to insure the rights of individuals. These rights would provide additional protection with no time limit as to their enforcement. In effect, this has been the way this section has been used since most litigants plead it as an alternative to other sections of the Charter.

For example, in the Crain case it was held that this section provided protection against self-incrimination that was broader than later sections of the Charter. The principle that a person should not be

compelled to incriminate himself is deeply rooted in the individual's right to "liberty and security of the person".

1. Scope of Application

In the Federal Court of Appeal decision in the Operation Dismantle case there was an attempt to narrow the scope of this section. Some judges stated that this section did not confer any independent absolute right to life or security of the person, while Mr. Justice Pratte stated that this section should not be interpreted in a manner which would allow the courts to substitute their opinions for those of Parliament and the Executive on purely political questions. However, on appeal, the Supreme Court of Canada, while dismissing the appeal brought by Operation Dismantle, determined that the courts can review federal cabinet decisions to ensure that the Canadian government honours a general duty to act in accordance with the dictates of the Charter. The dilemma which this decision may have raised is that the Court must decide when it must refrain from substituting its own judgment on a particular issue for that of the executive, while at the same time it must attempt to determine whether government policy violates the Charter. This is further illustrated in the Singh case, where the Supreme Court ruled that procedures for redetermining claims to refugee status, under which refugees have no right to an oral hearing, violate their rights under this section.

Despite this dilemma, it is clear that in appropriate circumstances the Supreme Court of Canada is prepared to utilize section 7 of the Charter to facilitate the right of the individual to challenge executive and governmental decision-making. In the Nelles case, the Court held that a citizen who had been injured by actions of a Crown prosecutor which were "maliciously in fraud of his or her duties" could pursue a civil claim for damages or seek a Charter remedy. This decision has done away with the centuries-old tradition of absolute immunity for Attorneys General and their agents. The Court held that a malicious prosecution would be one depriving an individual of the right to liberty and security of the person in contravention of the principles of fundamental justice.

2. Meaning of Fundamental Justice

Until recently, in most cases the interpretation given by the courts to this section has been different from the interpretation of the "due process" clause in the United States. In the Holman case, it was stated that the phrase "principles of fundamental justice" refers to procedural due process encompassing rules of natural justice, and that this section was not intended to incorporate any concept of substantive due process which would permit the courts to monitor the substantive content of legislation. The courts have applied this meaning of fundamental justice, holding that this section was violated when an applicant's parole was revoked without his being afforded an opportunity to make representations in person at a properly constituted hearing prior to the decision. The Federal Court determined that in this case the major denial of fairness flowed from the failure to notify the applicant adequately of the reasons for which revocation was being considered, so that he would have an opportunity to answer the allegations. The court stated that fundamental justice requires procedural fairness commensurate with the interest affected. In the Potma case "fundamental justice" was described as a compendious expression intended to guarantee the basic right of citizens in a free society to a fair procedure. The case emphasized that the principles or standards of fairness essential to the attainment of fundamental justice are in no sense static and will continue to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust.

While the above interpretation has been adopted by most courts, it is important to note the decision of the British Columbia Court of Appeal regarding the section of the British Columbia Motor Vehicle Act which imposes absolute liability for the offence of driving while one's licence is suspended. It was held in that case that this section of the Charter allowed courts to go further than dealing with the procedural safeguards required by natural justice and allowed them to consider the content of legislation as well. This is consistent with an interpretation espoused by Morris Manning in a book on the Charter. He argues that the framers of the Charter must have meant "fundamental justice" to include

more than simply "natural justice" or they would have used the phrase "natural justice" and discarded the phrase "fundamental justice". The Supreme Court of Canada ruled unanimously in this case that British Columbia legislation which imposes mandatory jail terms on motorists found driving while their licences are suspended is unconstitutional. It was determined that the public interest in safer roads does not override the fundamental legal guarantees against arbitrary imprisonment. The main problem in this case for the court was that absolute liability under the statute in question meant that the motorist was guilty even if he did not know his licence was suspended and had tried to find out. It was determined by the court that it is a principle of fundamental justice that the innocent - those who do not know they are committing an offence - should not be punished. The court went on to say that the phrase "fundamental justice" means more than mere procedural fairness. The court will employ an analysis of the nature, sources, rationale and essential role of the law in question in order to determine whether it violates the principles of fundamental justice.

It is interesting that this British Columbia judgment has been followed in Ontario. In the Roche case, on appeal, the accused was able to resort to s. 7 to remedy a denial at trial of a mistake of fact defence. This was clearly invoking s. 7 in a substantive context. In the Young case, the Ontario Court of Appeal, when dealing with the argument that the Crown had delayed in charging the accused, utilized s. 7 when it concluded "in all the circumstances, to subject the accused to a trial on these criminal charges would put his liberty at risk in a manner contrary to those fundamental principles of justice which are the hallmark of the criminal justice system and which are now enshrined in this section".

British Columbia also provides in the Robson case a good example of the application of s. 7. The Motor Vehicle Act empowers a peace officer to request a driver whom he has reason to suspect has consumed alcohol to pull over and surrender his driver's licence. This, therefore, permits the temporary suspension of the licence. This suspension was held to be an infringement of liberty contrary to the principles of fundamental justice and not saved by s. 1 of the Charter. Liberty was defined by the

court to be the power to do as one wishes without restraint. However, liberty must be subject to limitations. The court determined that while there is no absolute right to drive, and driving may be prohibited in certain circumstances, nevertheless such a prohibition is a deprivation of liberty. Such a deprivation in these circumstances is not in accordance with the principles of fundamental justice.

As the courts have become more familiar with the possible extent of this section, they have become more daring with regard to its possible meanings. For example, the British Columbia Court of Appeal has ruled that section 7 protects incidental economic rights. The Court held that this section may also include individual freedom of movement, including the right to choose one's occupation and where to pursue it. In this case, doctors in British Columbia were challenging the 1985 Medical Service Act, which attempted to cut medical costs by restricting the issue of billing numbers to newly qualified doctors. Doctors wishing to work in remote areas would be allocated billing numbers. Young doctors just entering the profession had no hope of working in large urban centres.

The court stated that just because a case had economic rights as an incidental factor was no reason to deny the applicants Charter protection. It was held that the system for applying for billing numbers and the legislation itself violated fundamental justice. The criteria were vague and uncertain, and the discretion exercised was uncontrolled.

3. General Application of Section to Criminal Law

Shortly after the Charter was adopted, courts indicated that they were not generally willing to apply this section broadly in order to change the existing tenets of criminal law. For example, in the Balderstone case this section was held not to affect the section of the Criminal Code which authorizes the Attorney-General to indict an accused despite his discharge on a preliminary inquiry.

Statutes which impose minimum sentences have been held not to offend this section. In the Gustavson case, it was decided that the dangerous offender sections of the Criminal Code did not violate s. 7 of the Charter; in later cases, however, s. 7 was used to review the

incarceration of dangerous offenders. It was also decided that court-ordered medical examinations during lawsuits in which the physical or mental condition of a party is in issue do not contravene the Charter as amounting to a deprivation of liberty.

However, in one case the Ontario Supreme Court went against this trend when it ruled as unconstitutional the strict prohibitions on questioning sexual assault complainants in court about their sexual history. There have been conflicting judgments on this subject in British Columbia, Manitoba and the Northwest Territories. The sections of the Criminal Code which were ruled unconstitutional were passed in January 1983 and stated that only in a very narrow range of cases could the complainant's sexual history be considered at trial. This is a matter which will eventually be dealt with by the Supreme Court of Canada.

4. Morgentaler v. The Queen

In a five-to-two judgment, the Supreme Court of Canada held that the abortion law contained in the Criminal Code contravened a pregnant woman's rights under section 7 of the Charter in a manner that was contrary to the principles of fundamental justice. The judges further held that this breach could not be saved by the reasonable limitation clause under section 1 and they therefore concluded that the law was invalid.

Although the majority of the court was unanimous in concluding that the abortion law was unconstitutional, three separate judgments were written in support of this finding. These are but some of the reasons that were given:

- The pregnant woman's right to the security of the person under section 7 is infringed by section 251 of the Criminal Code because under this provision a woman is forced, by threat of criminal sanction, to carry a fetus to term unless she meets certain criteria that are totally unrelated to her own priorities and aspirations. This constitutes not only a profound interference with her body, it also inflicts considerable emotional stress on her, given that she does not know whether her application for an abortion will ultimately be approved or not; both of these effects conflict with her right to security. Furthermore, the delays incurred in obtaining a therapeutic abortion

under the mandatory procedures set out under section 251 result in a higher probability of medical complications and greater risk for the woman, thereby also impairing her right to security.

- The statutory requirements for an abortion under section 251 do not accord with the principles of fundamental justice. They constitute a too-cumbersome mechanism which not only creates uneven access to abortion, but causes significant delays as well. While Parliament may be justified in requiring a reliable, independent and medically sound opinion as to the "life or health" of the pregnant woman in order to protect the state interest in the fetus, certain of the mandatory requirements under the law are manifestly unfair because they are unnecessary in respect of Parliament's objectives in establishing an administrative structure for the performance of abortions and because they result in additional risk to the health of the woman.

- The abortion law cannot be saved under section 1 of the Charter, for the specific means chosen by Parliament are out of proportion to the legislative objective it seeks to achieve.

Apart from the obvious fact that there is no longer an enforceable federal prohibition against abortions in Canada, the full import of the Court's ruling in the Morgentaler case is as yet unknown. The majority of the Court did not rule that women had an unconditional right to abortion under the Charter. On the contrary, it merely concluded that the existing provisions were such as to impair irretrievably a pregnant woman's section 7 rights. All five Justices comprising the majority acknowledged that the interests of the fetus were deserving of constitutional recognition under section 1. Three expressly stated that a law restricting abortions might yet be consistent with the Charter, for at some point during the pregnancy the state's interest in protecting the fetus might be sufficiently compelling to override the rights that women otherwise have under the Charter. Although the Justices did not indicate when this compelling state interest might crystalize, Madam Justice Wilson, who wrote the strongest judgment against the existing abortion law, made the following comments:

> The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester.

It bears noting that the Court in the Morgentaler case based its decision exclusively on the rights of pregnant women under the Charter; it did not consider what rights, if any, the fetus might also have, since in its view a determination on this question was unnecessary to the disposition of the case. Similarly, in the Borowski case, the Court held that a decision as to whether ss. 7 and s. 15 of the Charter protected the rights of the fetus was not in the public interest since the Morgentaler decision had struck down the abortion provisions in the Criminal Code. The Court refused to depart from its traditional role by ruling on this issue because it said to do so would preempt the Executive and Parliament by effectively creating new legislation. In the absence of a legislative context, the Court ruled that the appeal was moot and the appellant had no standing as a consequence.

The latest ruling in this area from the Supreme Court of Canada was in the Chantal Daigle case in 1989. The Court set aside the natural father's injunction, which had prevented Miss Daigle legally, if not in fact, from obtaining an abortion. The Court ruled that a fetus is not a "human being" within the meaning of the Quebec Charter and, therefore, is not conferred with "legal personhood" or independent legal rights.

The Court did not go on, however, to consider the question of whether the Canadian Charter could be invoked to support the injunction. As the action was found to be purely civil between the parents, with "no state action ... being impugned," it would not be appropriate, said the Court, to deal with the "issue as to whether s. 7 ... could be used to ground an affirmative claim to the protection from the state..." Just as it had in Borowski, the Court said that it "should generally avoid making any unnecessary constitutional pronouncement."

C. Search or Seizure: Section 8

Section 8 of the Charter states:

> **Everyone has the right to be secure against unreasonable search and seizure.**

This section creates a new right which is not in the Canadian Bill of Rights. It raises certain definitional issues such as: is a standard of reasonableness attained when the search warrant section of the Criminal Code is complied with (s. 443). (That is, does the possession of a search warrant make a search reasonable; and what definition should be given to the term "secure"?) Could it be argued, as Manning does, that fundamental privacy rights are protected from excessive, abusive or indiscriminate searching without reasonable and probable cause?

A variety of court decisions have dealt with this section, deciding whether in various fact situations searches are or are not reasonable and the ancillary question of whether evidence obtained during the search can be adduced at trial.

1. Application

The courts have held that a corporation is included in the word "everyone" which delineates who should receive the protection of this section. It has also been noted that the word "seizure" is used in this section in association with the word "search" and therefore the protection afforded by this section does not extend to the taking of real property by expropriation.

The Supreme Court of Canada in its decision in the Southam case determined that this section of the Charter was applicable to the search and seizure sections of the Combines Investigation Act. In this case the court was dealing with the constitutional validity of these sections of this statute. Therefore, in directing its attention to this legislation, the court held these sections to be unconstitutional for two specific reasons. First, the person designated to authorize the search under the legislation was not capable of acting judicially because he was also charged with investigative and prosecutorial functions as a member of

the Restrictive Trade Practices Commission. Second, the relevant sections of the Combines Investigation Act which deal with authorizing searches and seizures do not contain the minimum standard required by the Charter. The criteria are that there must be reasonable and probable grounds, established under oath, to believe that an offence has been committed and that there is evidence of this offence to be found at the place of the search.

The court concluded that the search and seizure sections of the Combines Investigation Act were inconsistent with the Charter and of no force or effect as they failed to specify an appropriate standard for the issue of search warrants as well as not designating an impartial arbiter to issue them.

Similarly in the Kruger case, the Minister of National Revenue had authorized under the Income Tax Act, the search of the accused's business premises, private residences and business premises of other named persons. This authorization was approved by a judge of the Superior Court of Quebec on the basis of an affidavit. Following the seizure the accused made an application to the Federal Court trial division for an order quashing the authorization. The authorization was struck down as unreasonable because it was a blanket order covering the violation of any provisions of the Act and was not limited to the particular violations allegedly committed. The judgment was upheld in the Federal Court of Appeal because the Act conferred such a wide power of search and seizure that it leaves the individual without any protection against unreasonable searches and seizures.

The government was also involved in a case where it was held that the Canadian government has a common law right to control its border. Implicit in this right is the right to conduct reasonable searches. Therefore the search of luggage of an individual entering Canada who admits that he is carrying excess liquor is reasonable. Also when a suspected narcotic is located in the luggage of such a person, a personal or body search is also reasonable.

2. Warrant Improperly Granted or Obtained

In the Caron case a search warrant was obtained only with respect to stolen traveller's cheques. When the search was carried out, however, although no cheques were found, a prohibited weapon was seized which the police had had reason to believe was on the premises when they applied for the search warrant. The court held that the police should have disclosed that they were looking for a prohibited weapon when they requested the search warrant. "By withholding information from the justice of the peace, and by achieving the desired result on the pretext of being interested only in other unrelated items, the informant was removing the process from the judicial arena." It was held that the warrant obtained did not provide legal authority to conduct the search for the weapon. Similarly in the Imough case when it was learned at trial that the police officers did not have proper grounds for obtaining the warrant, the court held that "the admissibility of the evidence would shock the conscience of the community and bring the administration of justice into disrepute having regard to the sanctity of a person's dwelling and that the search in this case was conducted entirely without legal authority."

These decisions should be contrasted with the decision of the Ontario Court of Appeal in the Chapin case where the court, while agreeing that the police had conducted an unreasonable search and infringed the accused's rights under s. 8 of the Charter, decided to admit into evidence the items found by the police. The court, in deciding this, took into account such matters as the nature and extent of the illegality, unreasonableness of the conduct involved, and the fact that the police had been acting in good faith. In the Cameron case, the court determined that in order to properly obtain a search warrant under s. 10 of the Narcotic Control Act the narcotics must be present in the premises at the time of the application for the warrant. However, the invalidity of the warrant does not by itself establish that the search made pursuant to the warrant is unreasonable.

Perhaps the best statement of law on the subject of warrants is contained in the Rao case. The court stated that, unlike the Fourth

Amendment to the U.S. Constitution, this section of the Charter does not create a "warrant clause". Therefore the central issue in any case in which the validity of a search or seizure is challenged is whether the particular search or seizure meets the constitutional requirement of reasonableness unfettered by any constitutional requirement of a warrant.

3. Writs of Assistance

Decisions have been rendered by the courts both for and against the principle of whether writs of assistance offend this section of the Charter. Recently the courts seem to be dealing with this question on a case-by-case basis rather than following a blanket policy. If reasonable grounds were present for the search but there was insufficient time to obtain a warrant in the normal way, then the use of a writ of assistance may be upheld. In an Ontario case, the court determined that police officers must "reasonably believe" there is a narcotic in the accused's house rather than simply have "mere suspicion" before using a writ of assistance.

More recently, however, the Ontario Court of Appeal in the Noble case struck down writs of assistance as being unconstitutional.

4. Plain View Doctrine

In the Shea case, the Ontario High Court followed the "plain view" doctrine cases in the United States when it decided that once a police officer is lawfully in residential premises, he has the right to seize articles such as narcotics which are in plain view.

5. Search of the Person

A review of the cases where search of a person was conducted seems to indicate that the courts strictly scrutinize such searches and in many cases find them unreasonable and exclude any evidence obtained as a result of them. For example, in a British Columbia case the accused was sitting in a bar which apparently was frequented by heroin users and traffickers. The accused was seized by two police officers, one of whom employed a choke hold which rendered her semiconscious, while the other forced her mouth open. While this was happening, three caps of

heroin dropped out of the accused's right hand. The court held that the officers in this case did not have reasonable and probable grounds to believe that narcotics were in the accused's mouth and that therefore the search was unlawful. The court went further and determined that to admit the evidence would bring the administration of justice into disrepute, for it would condone and allow the continuation of unacceptable conduct on the part of the police. This decision, rendered in the important Collins case, was affirmed on appeal by the Supreme Court of Canada.

In the Heisler case, a random search of people entering a rock concert disclosed a large quantity of drugs in the accused's possession. However, the evidence revealed that there had been no grounds upon which to base the search. The court determined that the accused had been subjected to an unreasonable search which went beyond the bounds of mere bad taste and impropriety. The evidence was excluded on the basis that otherwise the administration of justice would be brought into disrepute. However, in the Roy case the Ontario High Court held that where there are signs posted making submission to a search a condition precedent to entering a rock concert, a subsequent search is not in violation of this section.

The Federal Court of Appeal has ruled that the practice of cross-gender searches of Canada's male prisoners in non-emergency situations offends this section.

In the Debot case, the police received a tip from an informant that the appellant was going to take delivery of a substantial quantity of the amphetamine, "speed." He was stopped, ordered from his car, told to assume a "spread eagle" position and to empty his pockets. Speed was found.

Although the search was carried out without a warrant, the Supreme Court of Canada held that the police had acted reasonably and that the evidence should not have been excluded as the trial judge had ordered. Chief Justice Dickson said that although a detainee has the right to be informed of the right to retain and instruct counsel immediately upon detention - a requirement the police had observed in this case - and although the "spread eagle" direction amounted to a detention, the police

are not obligated to suspend a search as an incident to an arrest until the detainee has had the opportunity to retain counsel.

His Lordship went on to say that "denial of the right to counsel as guaranteed by section 10 of the Charter will result in a search's being unreasonable in only exceptional circumstances. A search is reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. The denial of the right to counsel does not affect the 'manner' in which the search is conducted." The Court said that the manner in which the search is conducted relates to the physical way in which it is carried out." The Court went on to say that "evidence obtained by way of a search that is reasonable but contemporaneous with a violation of the right to counsel will not necessarily be admitted," and, indeed, "evidence will be excluded if there is a link between the infringement and the discovery of the evidence, and if the admission of the evidence would bring the administration of justice into disrepute."

This position has been repeated many times by the Supreme Court in what now amounts to a plethora of search and seizure cases heard since the Charter came into force and of which the majority have had to do with drug seizures.

6. Breath Tests and Blood Samples

The cases usually hold that compulsory breath tests do not constitute unreasonable search and seizure since these can only be demanded when there are reasonable and probable grounds to believe the motorist is impaired. The Ontario case of R. v. Fraser has determined that when these reasonable and probable grounds are missing, the taking of a breath sample amounts to unreasonable search and seizure.

The Supreme Court of Canada has delivered a judgment dealing with a set of facts which arose prior to the implementation of the Charter. In the Dedman case the Court upheld the legality of random roadside breathalyzer checks. The common law powers of the police were described by Mr. Justice Le Dain as anything necessary for their duties of preserving the peace, preventing crime and protecting life and property.

Similarly the Ontario Court of Appeal has ruled that random spot checks of motor vehicles are constitutional if they are part of "an organized program of stopping vehicles".

In a unanimous ruling, the Supreme Court of Canada upheld the constitutionality of spot checks of drivers and of roadside breath tests. The Court said that the rights of drivers in both cases are being infringed but that such infringements are justified. Spot checks, in the opinion of the Court, play an important role in keeping the roads safe.

The courts seem to be agreed that there is no unreasonable search and seizure involved where hospital personnel take a blood sample from an accused for use in treating him and where the sample is later turned over to the police pursuant to a search warrant.

In the Dyment case, however, the Supreme Court of Canada held that evidence concerning the results of a blood sample analysis should be excluded when a doctor, having taken a sample for purely medical purposes, turns that sample over to an investigating police officer who has not noted signs of impairment and who has neither asked the respondent to provide a blood sample nor asked the doctor to do so.

The Court said that s. 8 is concerned not only with the protection of property but also with the protection of the individual's privacy against search or seizure. It considered the doctor's action in taking the blood and the police officer's receipt of it as a very serious Charter breach: "A violation of a persons's body is much more serious than a violation of his office or even his home," said the Court.

D. Arrest and Detention: Sections 9 and 10

These sections of the Charter state as follows:

> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

The wording of s. 9 does not establish a standard by which arbitrariness can be measured. Professor Hogg argues that a detention or imprisonment which was not authorized by any law would certainly be arbitrary. A detention or imprisonment which was authorized by a law which did not supply reasonably precise substantive standards and adequate procedural safeguards would probably also be arbitrary, depending perhaps on the circumstances in which it was intended to apply. Also the words "detained" in s. 9 and "detention" in s. 10 have presumably the same meaning which under the interpretation given by the courts to similar wording in the Canadian Bill of Rights denotes some form of compulsory restraint.

The courts, when applying s. 9, have tended not to overturn standard police practices. Thus, police demands that an accused submit to finger printing as required by law have been held not to be unreasonable or capricious. In the Higgins case, the Supreme Court of Canada held that taking the fingerprints of an accused while he is in custody or is directed by an appearance notice or summons to appear, does not violate any of ss. 7, 8, 9, 10, 11(c) or 11(d) of the Charter. The Court said that fingerprinting is not contrary to the principle of fundamental justice and that the procedure is a relatively minor intrusion compared to others permitted the police at common law. Finally, although the Court acknowledged that the Charter guarantees a reasonable expectation of privacy, it held that a person arrested or charged must expect a significant loss of personal privacy.

Also, it has been decided that the provisions of this section are not infringed when a motorist is stopped on a highway by a police officer for a vehicle check and where a demand is made to take a breath test when the police officer smells alcohol on the motorist's breath. For example in R. v. Cayer, the Ontario Court of Appeal decided that the common police practice of automatically arresting impaired driving suspects before administering a breathalizer test does not constitute

arbitrary detention under section 9. Mandatory minimum sentences have also been held not to violate this section.

With reference to section 10(a) the Amos case states that the Charter now enshrines what has always been the case in Canada, that the law does not recognize any right in the police to arrest or detain against his will any person who is not charged with an offence, merely for the purposes of investigating an offence which the police believe has already occurred.

1. Right to Retain Counsel

In the Ironchild case it was held that this section is not violated when the accused, questioned as to whether he wishes counsel, gives a somewhat ambiguous reply and expresses only a vague desire to consult a lawyer, it being proper for the police to repeat the question without doing anything further. However, in the majority of other cases, the courts have held that this right, when explained, must result in the accused being given a real opportunity to retain counsel. In the Nelson case, it was stated "there should not be a mere incantation of a 'potted version' of the right followed by conduct on the part of the police which presumed a waiver of the right. ... The thrust of this provision is the guarantee of information so that an early opportunity to make a reasoned choice is available to the accused. The purpose of making the accused aware of his right is that he may decide, and that means he should have a fair opportunity to consider whether he wishes to resort to his right."

The Ontario Court of Appeal, in overruling a lower court decision, has held that police officers do not have a duty to help an accused obtain legal advice. It was felt that to hold to the contrary would set too high an obligation on the police.

The Supreme Court of Canada has also considered the issue of whether there is an obligation upon the police to assist an accused person to exercise the right to counsel. Whereas, in the Manninen case the Court expressly left this question open, in the Baig case the Court held that a police obligation to provide an opportunity to retain and instruct counsel only arises where the accused has initially expressed the desire to

exercise the right. The corollary of this ruling is that the failure of the police to do anything to promote the exercise of a Charter right will not amount to a Charter violation if the accused does not invoke the right.

A new twist was given to the interpretation of this section when the Federal Court of Appeal determined that prisoners charged with violating prison rules have the constitutional right to have a lawyer present at almost all disciplinary proceedings.

In the Kelly case, the Ontario Court of Appeal drew a distinction between the interests protected by paragraphs (a) and (b) of section 10. With respect to para. (a), the court held that a person is not obliged to submit to an arrest if he does not know the reason for it, and accordingly it is essential that he be informed properly or immediately of the reasons. On the other hand, the relevant interest affected by para. (b) is that of not prejudicing one's legal position by something said or done without, at least, the benefit of legal advice. The requirement that the accused be informed "promptly" of the reason for the arrest means that he be informed "immediately". However, the requirement that the accused be informed of the right to counsel "without delay" is not the same as immediately. Thus, while there may be good reason why an arrested person's right to be informed of his right to counsel should be "without delay" there is no essential reason why it has to be a part and parcel of the statement under para. (a) as to the reason for the arrest, which is really part of the arresting process itself.

The Supreme Court of Canada in the Manninen case held that section 10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay; this includes the duty to offer the respondent the use of the telephone. Although circumstances might exist where it is particularly urgent for the police to continue with their investigation before thus facilitating a detainee's communication with counsel, there was no such urgency in this case. Second, the police must refrain from questioning the detainee until he has had a reasonable

opportunity to retain and instruct counsel. The purpose of granting right to counsel is not only to allow the detainee to be informed of his rights and obligations under the law but also, and equally if not more important, to obtain advice as to how to exercise those rights.

It was held in this case that the police officers correctly informed the respondent of his right to remain silent and the main function of counsel would have been to confirm the existence of that right and then to advise the detainee on how to exercise it. For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence. This aspect of the respondent's right to counsel was clearly infringed, however, as police continued questioning when there was no urgency to justify it.

The respondent did not waive his right to counsel by answering the police officers' questions. A person may implicitly waive his rights under s. 10(b), but the standard is very high and was not met in this case.

In the Therens case, the Supreme Court of Canada considered the issue of breathalyzer testing and s. 10(b) rights. In the course of deciding whether a person arrested or detained for impaired driving need be informed of his right to retain and instruct counsel before deciding how to respond to a breathalyzer demand, the Court offered for the first time a comprehensive definition of the word "detention" as used in s. 10 of the Charter. The Court held that detention was the restraint of liberty, other than arrest, by the police or some other agent of the State; such restraint was not limited to physical compulsion or control. Detention would also result, said the Court, if the individual submitted or acquiesced in such deprivation of liberty (in this case as the result of a breathalyzer demand) because he or she felt "the choice to do otherwise does not exist."

The Court went on to hold that a charge of failing the breathalyzer test or refusing to provide a breath sample would not stand if the offending motorist was not informed of the right to retain and instruct counsel without delay. In a case where a person received an approved screening device ("A.L.E.R.T.") demand, however, the requirement that he or she provide such sample "forthwith" was incompatible with the wording in

s. 10(b) of the Charter and, hence, was a "reasonable limit" on this right, as provided in s. 1 of the Charter. Similarly, the Court held that the police are under no obligation to comply with s. 10(b) of the Charter when the person is merely charged with impaired driving rather than failure of the breathalyzer test or refusal to provide a breathalyzer sample as distinct from an A.L.E.R.T. sample; in that circumstance there is no connection between the recovery of self-incriminating evidence and a Charter violation.

The causal connection between the breach of an individual's s. 10(b) rights and the recovery of evidence was recently considered by the Supreme Court of Canada in the Black case. This involved a charge of murder, during the investigation of which the weapon used, a knife, was recovered by the police after the appellant had given them a written statement. The Court held that there had been a breach of the appellant's rights under s. 10(b) in that the police had continued to question the appellant despite the fact she was drunk and despite her clear prior request for the opportunity to consult counsel. For this reason, any evidence recovered thereby and thereafter should be excluded.

Many lower court decisions have followed Therens and many interesting developments in the law have resulted. One of these is the decision of the Appeal Division of the Nova Scotia Supreme Court in the Baroni case. This decision held that the results of physical coordination and sobriety tests conducted by police officers at the roadside were to be excluded where the individual tested had not been informed of the right to retain and instruct counsel as provided in section 10(b) of the Charter.

2. Habeas Corpus: Section 10(c)

Habeas corpus means literally "you have the body." It is a term for a variety of ancient writs which commanded a person detaining another to produce the prisoner before a court or judge.

In the Gamble case, the Supreme Court of Canada breathed new life into this procedure by ruling that habeas corpus was, in appropriate circumstances, available as a Charter remedy. In this case, the respondent had been incarcerated following his conviction for a first degree murder

for which he had been tried pursuant to Criminal Code provisions which were not yet in force.

Taking what it termed "a purposive and expansive approach," the Court granted the remedy of habeas corpus. The Court held that an individual enjoyed "a residual liberty interest" found in s. 7 and it was clear in this case that the respondent had been deprived of his liberty in contravention of the principles of fundamental justice.

E. Specific Rights: Section 11

Most cases dealing with this section which have come before the criminal courts have been in relation to the first four subsections, which state as follows:

> 11. Any person charged with an offence has the right
>
> (a) to be informed without unreasonable delay of the specific offence;
>
> (b) to be tried within a reasonable time;
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

The opening words of s. 11 lend themselves to some interpretation problems. Does "person" include a corporation? The word "offence" would probably include any breach of the law, whether federal or provincial, to which a penal sanction is attached; would it also apply before some regulatory or disciplinary body where the accused or defendant is subject to some other sanction?

This second query has been answered in a preliminary way by the James and Law Society of British Columbia case wherein it was held that this section has no application to civil proceedings, and that therefore a person cited for professional misconduct has not been charged with an offence within the meaning of s. 11.

1. Informed of Specific Offence

The courts have interpreted "the right to be informed without unreasonable delay of the specific offence" as arising when the information is laid; that is, when the person is "charged with the offence". It has also been held that this section does not offend the right to lay charges in the alternative.

An example of the operation of this subsection can be seen in the Ryan case wherein the court quashed an information which was laid two months after the accused received an appearance notice.

The courts have interpreted the phrase "informed ... of the specific offence" pragmatically, as implying the right to be informed of the substantive offence and the acts or conduct which allegedly form the basis of the charge.

2. Tried Within a Reasonable Time

Many recent applications brought in the criminal courts have concerned pre-charge, and, particularly, post-charge delays in bringing matters to trial. The Supreme Court of Canada has delivered recent judgments in both areas.

It would appear that the Court has now settled once and for all the question of whether pre-charge delay is relevant in determining if an accused's right to be tried within a reasonable time has been infringed. In the Pion and Kalanj cases, the Court held that s. 11 affords protection to an accused person only after he or she has been charged with an offence. The Court ruled that the rights of the accused prior to the charge are protected by general law and ss. 7-10 of the Charter. Pion and Kalanj had been involved in a joint criminal enterprise but were charged separately.

Addressing the question of post-charge delay, the Court held in the Conway case that the focus of the protection afforded by section 11(b) of the Charter is not the "impairment or prejudice" arising from the fact of being charged but, rather, it is the impairment or prejudice resulting from the delay in "processing or disposing of the charges against

an accused" which is determinative. The Court went on to say that the "cut-off point after which a delay becomes unreasonable must be determined by balancing a number of factors including, among the most important ones, the prejudice suffered by the accused, the waiver of time periods, the inherent time requirements and the limitation on institutional resources." The Court reasoned that to a large extent, in the face of backlogged court dockets and various delays and postponements initiated by the Crown, the obligation rests on an accused to seek the earliest possible trial date, not to accede to lengthy or repeated postponements and not to be at fault otherwise by causing the delay of the processing or resolution of the charges.

The Supreme Court appears to have moderated this position with its decision in the Smith case where there had been a 16-month, largely Crown-initiated delay between the laying of the charge and the commencement of the preliminary inquiry. The Crown had sought such a protracted delay because it required the services of the investigator in court during the anticipated week-long preliminary and, at the time of arraignment, he was scheduled to be on one year's course leave from the police.

As it had done before, the Court said that in determining whether the delay is "unreasonable," four factors must be considered:

(1) the length of the delay;

(2) the reason for the delay, including limits on institutional resources and the inherent time requirements of the case;

(3) waiver of time periods; and

(4) prejudice to the accused.

The Court acknowledged that there was disagreement at lower court levels as to how to balance the first three factors with the fourth, as well as how to balance all four simultaneously.

The Court confirmed that the accused, as the applicant for Charter relief on the basis of unreasonable delay, carries the burden of proof throughout; however, that burden may shift to the Crown, especially

in a case like this where "a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment." The Court went on to say that in "the absence of such an explanation, the Court would be entitled to infer that the delay was unjustified."

The Court acknowledged that it was here dispensing with the tried and true method of deciding such questions on the basis of the burden of proof and was opting for the "preferable" practice of evaluating "the reasonableness of the overall lapse of time having regard to the factors referred to above." In this case, the delay was found to be unjustified and inordinate. Indeed, the Court found that the Crown had a duty to attempt to arrange an earlier date, a decision which, if not confined to this case, will certainly have a significant impact on court scheduling across Canada. It seems that this obligation will fall to the Crown alone since the Court said there "is no obligation ... on the part of the accused to press the case on, which relieves the Crown of its obligations under s. 11(b)." Furthermore, contrary to earlier lower court rulings, the Court went on to say that "inaction or acquiescence on the part of the accused, short of waiver," does not result in the forfeiture of that person's rights under s. 11(b).

3. Right Not to be a Compellable Witness Against Oneself

This subsection is widely worded and on this basis, Professor Martin Friedland argues that it may prevent the enactment of a law compelling the accused to give evidence at a preliminary hearing and also compelling one to give evidence to a police officer.

An Ontario Court of Appeal decision in the Crooks case indicates that this paragraph does not prevent the Crown from calling as a witness on a preliminary inquiry an accused separately charged with the same offence.

It should also be noted that this subsection has been interpreted as not impinging upon the taking of breath samples. In the Stasiuk case, it was decided that "the privilege against self-incrimination

is a limited one which applies to an accused qua witness and is restricted to a testimonial compulsion. A breath test is not in the nature of a statement or a testimonial utterance."

A recent Ontario case involved the seeking of a civil remedy while there were outstanding criminal charges connected with the same fact situation. It was decided that s. 11(c) of the Charter does not mean that a person who chooses to defend a civil action is not compellable in the civil proceeding if this arises from facts that are also the subject of simultaneous criminal proceedings. The court added that neither s. 11(c) nor s. 13 of the Charter give any hint of support for the proposition that the privilege against self-incrimination means that a party has the right to remain silent in parallel civil proceedings.

Moreover, this section does not exempt one from being called as a witness at either a coroner's inquest or before a Royal Commission of Inquiry.

4. Presumption of Innocence

This subsection has given rise to two groups of cases. The first deals with the "reverse onus" clause in the Narcotic Control Act. The Oakes case involved a charge of possession of eight one-gram vials of hashish oil for the purpose of trafficking. The accused was found guilty of possession under the Narcotic Control Act and then had to prove that he did not intend to sell the drugs. Both the Trial Court judge and the Ontario Court of Appeal ruled that this provision violates the presumption of innocence guaranteed by the Charter. Recently the Supreme Court of Canada has affirmed these decisions. This may affect "reverse onus" clauses in other statutes.

The question of whether the Ontario Provincial Court is a "fair and impartial tribunal" because of the dependence of the judges on the province of Ontario for their tenure, income and pensions will also be dealt with by the Supreme Court of Canada when it hears the Valente case.

The Ontario Court of Appeal has held that though the use of breath test results to prosecute impaired drivers may infringe on the right to be presumed innocent until proven guilty, the infringement is

"demonstrably justified in a free and democratic society." Therefore the use of these test results is constitutional. This decision has been upheld by the Supreme Court of Canada. The Court stated that the objective of protecting the public against drunk drivers is sufficiently important to warrant overriding a constitutionally protected right.

The Supreme Court of Canada ruled in the Corbett case that allowing prior criminal convictions into evidence does not deprive an accused of his right to a fair trial under this section of the Charter. The section of Evidence Act which allows this, permits an accused who is testifying on his own behalf to be cross examined with respect to his prior convictions. The rationale is that prior convictions can bear on the witness's credibility.

F. Cruel and Unusual Treatment or Punishment: Section 12

Section 12 states:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

While this section has not been used to set aside the dangerous offender sections of the Criminal Code as unconstitutional, it has provided the courts with an opportunity to review incarceration under this section of the Criminal Code. Mr. Justice Allan Linden of the Ontario Supreme Court has held that "indefinitely detaining a menace to society is cruel and unusual punishment and violates the Charter of Rights and Freedoms." However, in a case where it was dramatically shown that the accused was dangerous and there was a likelihood that he would cause death or injury to other persons if his behaviour was not restrained, it was concluded that this section of the Charter would not be violated.

In the Mitchell case, the Ontario Supreme Court attempted to devise a standard which could be applied when determining whether treatment or punishment was cruel and unusual. The treatment or punishment would have to be so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. "The test is one of disproportionality: is the treatment or punishment disproportionate to the

offence and the offender? Evidence that the treatment or punishment is usually severe and excessive in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment will suffice to satisfy the test of disproportionality."

This test was further subdivided and amplified in the Soenan case which dealt with complaints by a prisoner in pre-trial custody. The court here defined the meaning of cruel and unusual treatment. It determined that the relevant factors are whether the treatment is in accordance with public standards of decency and propriety; whether it is unnecessary because of the existence of adequate alternatives; and whether or not it can be applied upon a rational basis and in accordance with ascertained or ascertainable standards. Using these tests and applying some new ones (such as "does the treatment have a social purpose and can it be applied upon a rational basis in accordance with ascertainable standards?") the Federal Court Trial Division in the Belliveau (No. 2) case held that the mandatory supervision program does not authorize cruel and unusual treatment or punishment. In Regina v. Swain, the Ontario Court of Appeal found that the section of the Criminal Code which provides that the trial judge shall order a person found not guilty by reason of insanity to be kept in strict custody until the pleasure of the Lieutenant-Governor of the province be known, does not subject the acquittee to cruel and unusual punishment.

In the Smith case, the Supreme Court of Canada was called upon to decide whether the mandatory seven year minimum sentence for importing narcotics, contrary to s. 5(2) of the Narcotics Control Act, breached this section of the Charter. The Court, with one dissenting judgment, held that the section did breach s. 12 and was not justified under s. 1 as a reasonable limit.

It was undisputed that the purpose of the legislation to deter the drug trade and punish importers of drugs, was valid. However, this did not prevent the court from ruling on the validity of the section. Lamer J. (writing also for Dickson, C.J.) discussed the Charter limits on "treatment or punishment".

It is generally accepted in a society such as ours, he stated, that the state has the power to impose a "treatment or punishment" on an individual where it is necessary to do so to attain some legitimate end and where the requisite procedure has been followed. The Charter limits this power: s. 7 provides that everyone has the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice; s. 9 provides that everyone has the right not to be arbitrarily detained or imprisoned; and s. 12 guarantees the right not to be subjected to any cruel and unusual treatment or punishment.

The protection in s. 12 governs the quality of punishment, and its effect on the person. The words "cruel and unusual" are to be read together as a "compendious expression of a norm". The criterion to be applied is "whether the punishment prescribed is so excessive as to outrage standards of decency"; the effect of punishment must not be grossly disproportionate to what would have been appropriate. This reasoning is very similar to that found in the Mitchell case.

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from him or her. The other goals which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that in determining a sentence the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender; it means only that the resulting sentence must not be grossly disproportionate to what that offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate,

to their particular circumstances, while s. 1 permits this right to be overriden to achieve some important societal objective.

Other cases dealing with the application of this section have concentrated mainly on such matters as solitary confinement and the double-celling of inmates in penitentiaries.

G. Self-Incrimination: Section 13

This section provides that:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

This is similar to s. 5(1) of the Canada Evidence Act with one important exception: the Evidence Act contemplates that an objection must be made by the witness, whereas the Charter does not. A minor change is that the Charter allows a later prosecution for the giving of contradictory evidence (evidence dissimilar to that previously given) as well as for perjury. This change was necessary because the Canada Evidence Act has been interpreted as not encompassing a contradictory evidence charge within the word "perjury".

This section is obviously linked with s. 11(c) and perhaps the best explanation of the impact of these sections upon the rights of an accused is contained in the Ontario Court of Appeal decision in the Altseimer case wherein the court stated that "the Charter does not confer a broad privilege against self-incrimination but confers specific protection in s. 13 and s. 11(c)". That protection continues to be protection against testimonial compulsion and nothing else, although the protection afforded to the witness by this section is enhanced since the witness need no longer claim protection as he had to pursuant to the Canada Evidence Act.

An interesting situation developed in the Dubois case where it was held by the Alberta Court of Appeal that the testimony of an accused at his own trial may be used by the Crown in an attempt to incriminate him at a new trial ordered by the Court of Appeal after his successful appeal

against his conviction. It was determined that the second trial of an accused for the same offence is not an "other proceeding" within the meaning of this section, and therefore his previous testimony can be used against him. The Supreme Court of Canada reversed the decision of the Alberta Court of Appeal in this case and determined that an accused's incriminating testimony given in the initial trial could not be used against him in a subsequent retrial ordered by the Court of Appeal. However, the Supreme Court did not say whether it would rule out the use of previous testimony for the purpose of cross-examination in the re-trial. It was also felt by the court that allowing the prosecution to use the accused's previous testimony would amount to compelling the accused to testify, thus contradicting the rights to remain silent and to be presumed innocent.

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